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## EVANGELICAL REFORM AND THE PARADOXICAL ORIGINS OF THE RIGHT TO PRIVACY

JOHN W. COMPTON\*

The story of how American constitutional law came to recognize a right to privacy in matters pertaining to sex and reproduction has been told many times. The most familiar version of the story follows a “whiggish” trajectory, and describes a century-long struggle between two fundamentally incompatible philosophies or worldviews.<sup>1</sup> The older philosophy held that republican government was impossible in the absence of what William Novak has called a “well-regulated society”—that is to say, in the absence of broadly shared, and legally enforced, moral standards.<sup>2</sup> The newer philosophy, which follows the basic contours of John Stuart Mill’s harm principle, maintains that the state should permit citizens to follow their own inclinations in the realm of sexual intimacy, at least so long as their conduct is consensual and does not involve direct harm to others.<sup>3</sup>

Over time, we are told, the Millian philosophy gradually displaced the older, republican philosophy and its institutional manifestations. In the truly whiggish version of the story, the emergence of the modern right to privacy is celebrated; in critical versions, it is taken as evidence of the nation’s social and intellectual decline.<sup>4</sup> But in both versions, the journey’s major landmarks are the same.

The first signs of change can be seen in the decades following the Civil War, when a handful of state courts struck down moral laws that were

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1. See KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* 1–2 (2004) (examining the influence of “whiggish” narratives in American constitutional development).

2. See WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (arguing that early American law generally prioritized the enforcement of shared moral values over the protection of private rights).

3. JOHN STUART MILL, *On Liberty*, in J.S. MILL: *ON LIBERTY AND OTHER WRITINGS* 2–126 (Classic Books Int’l, 2010).

4. DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 260–66 (1994); MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 91–110 (1996) (critiquing the philosophical assumptions underlying the modern right to privacy); Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 188–92 (1982) (describing the development of the modern right to privacy in generally positive terms).

deemed overly restrictive of personal liberty.<sup>5</sup> By the end of the century, legal commentators from Christopher Tiedeman to Louis Brandeis had endorsed some version of “the right to be let alone”—though this right was not always defined in constitutional terms.<sup>6</sup> In the 1920s, Justice Brandeis, by then a member of the Court, described (in dissent) a constitutionally protected private sphere that extended to citizens’ “beliefs,” “thoughts,” and “emotions.”<sup>7</sup> By the early 1970s, the Court had recognized the existence of a constitutional right to privacy in “matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>8</sup> And in recent decades, the Court has reaffirmed and extended this right, often using language that evokes the argument of Mill’s *On Liberty*.<sup>9</sup> In its landmark 2003 decision invalidating a criminal ban on sodomy, for example, the Court described a constitutionally protected “autonomy of self” that includes the right to “define the meaning” of one’s “personal relationship[s].”<sup>10</sup>

To be sure, scholars who subscribe to the whiggish narrative acknowledge that the Court has not always framed its major privacy rulings in the language of personal autonomy. In *Griswold v. Connecticut*,<sup>11</sup> for example, the Court invalidated a ban on the dissemination and use of contraceptives, not because the law impinged on the right of citizens to choose their own paths in matters of sex and reproduction, but because the state had failed to respect the associational rights of a specific group of citizens—namely, those who had entered into the “sacred” and “noble” institution of marriage.<sup>12</sup> Perhaps because they fit uneasily in the whiggish narrative, decisions such as *Griswold* are regularly dismissed as backward-looking or tradition-bound.<sup>13</sup> The clear implication is that these opinions, which define the right to privacy in terms of shared values and traditions,

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5. NOVAK, *supra* note 2, at 170–71 (arguing that the Civil War and Reconstruction “marked the beginning of a broad-based constitutional revolution in private rights” that “imposed new constitutional limits” on morals regulation).

6. See, e.g., CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT 148–50 (1886); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

7. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

8. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

9. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

10. *Lawrence v. Texas*, 539 U.S. 558, 562, 567 (2003).

11. 381 U.S. 479 (1965).

12. *Id.* at 485–86.

13. SANDEL, *supra* note 4, at 97 (noting that “the privacy right [*Griswold*] proclaimed is consistent with traditional notions of privacy going back to the turn of the century”); see also Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 85 (1980) (noting the “entirely tradition-centered rationale” of Justice Harlan’s influential dissent in *Poe v. Ullman*).

are less developmentally significant than their autonomy-based cousins. Although decisions such as *Griswold* inch the ball forward, they are perhaps best seen as placeholders. These decisions draw temporary lines in the sand, indicating that the Court is attempting simultaneously to accommodate social change and limit its constitutional impact. True constitutional development, it seems, occurs only when the Court can be persuaded to dispense with the communitarian façade and acknowledge the real motive force behind privacy's rise.<sup>14</sup>

Although there is much to be said for the developmental impact of the autonomy ideal, this Paper argues that the whiggish narrative ultimately fails to provide a complete or accurate account of privacy's rise. More specifically, I contend that constitutional development in the area of sexual privacy is better understood as an ongoing contest between *three*, rather than two, strands of the American legal/constitutional tradition. Missing from the whiggish narrative is a strand of constitutional thought that I label the theory of *moral agency*. This perspective on the law-morality relationship, which emerged from the evangelical reform movements of the nineteenth century, did not question the legitimacy or necessity of morals laws.<sup>15</sup> And yet its proponents broke with the traditional understanding of the well-regulated society at three key points. First, they looked to contemporary public opinion—rather than the codified wisdom of the past—to define the substantive content of morals laws. Second, they rejected the traditional view that the *end* of morals regulation was the maintenance of social cohesion rather than the moral improvement of society. Finally, they held that a high degree of individual agency was essential to an effective regime of morals police; local and discretionary authority, which counterproductively restricted the liberty of morally upstanding citizens, was viewed as an obstacle to moral progress.

Viewing the rise of modern privacy as a struggle between three strands of constitutional thought—the well-ordered society, Millian autonomy, and evangelical moral agency—sheds new light on twentieth-century constitu-

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14. See H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* 176 (1993) (noting that *Eisenstadt*, in contrast to *Griswold*, was an “intellectual milestone in constitutional history”); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1570 (2004) (describing Douglas's “phony” “rhapsody to the sacred and noble institution of marriage” as “traditionalist baggage” that was “soon jettisoned”).

15. A number of important studies have documented the emergence and evolution of the “agency” concept in post-Reformation political thought. James E. Block, for example, uses the term to refer to an individual who, of his or her own volition, participated “actively in shaping the worldly means to be employed for realizing divine and collective purposes.” Although I use the term in much the same way as Block, I make no claims concerning the relationship between the ideas of nineteenth-century American evangelicals and earlier generations of Protestant reformers. JAMES E. BLOCK, *A NATION OF AGENTS: THE AMERICAN PATH TO A MODERN SELF AND SOCIETY* 22–23 (2002); see also MICHAEL WALZER, *THE REVOLUTION OF THE SAINTS: A STUDY IN THE ORIGINS OF RADICAL POLITICS* (1965).

tional development in the area of sexual and reproductive privacy. In particular, it seems clear that at least some of the work usually attributed to the idea of autonomy (and its proponents) was actually performed by the idea of moral agency (and its proponents). More than mere placeholders for Millian autonomy, decisions such as *Griswold* tapped into a powerful reformist tradition that had long viewed individual agency as the surest route to a morally upstanding society. Bringing moral agency into the story also has the benefit of highlighting one of the more interesting ironies of American constitutional development. As we shall see, evangelical proponents of moral agency, in an effort to strengthen the nation's commitment to morals regulation, inadvertently laid the philosophical foundations for its ultimate abandonment.

#### I. THE TRADITIONAL ORDER: MORALITY WITHOUT AGENCY

To early American legal commentators, the necessity of strict morals laws was self-evident. Writing in the late 1820s, for example, Nathan Dane warned in his *General Abridgment of American Law* that no republic could long endure without "laws to prevent crimes against religion . . . and against morality."<sup>16</sup> Similarly, in his widely cited treatise on criminal law, the antebellum commentator Joel Prentiss Bishop noted with pride that "morality" and "religion" were "objects of particular regard" to American law.<sup>17</sup> And in as late as 1868, the influential judge and commentator Thomas M. Cooley endorsed a range of invasive morals laws on the theory that "the preservation of public morals is peculiarly subject to legislative supervision."<sup>18</sup>

That American criminal law should pay "particular" or "peculiar" attention to moral and religious offenses followed from prevailing beliefs concerning the social foundations of republican government. A succinct summary of this set of beliefs can be found in Judge James Kent's famous opinion upholding the blasphemy conviction of John Ruggles.<sup>19</sup> On appeal, Ruggles argued that the common law prohibition against blasphemy could not be enforced in New York since the state lacked an established religion. In response, Judge Kent reasoned that blasphemy was indictable at common law, not because of any harm done to the "rights of the church," but because long experience had shown that permitting open criticism of Christianity "tend[ed] to corrupt the morals of the people, and to destroy [the] good or-

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16. 6 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW WITH OCCASIONAL DATES AND COMMENTS 664 (Boston, Cummings, Hilliard & Co. 1823).

17. 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 325 (Cambridge, Allen & Farnham, Printers 1856).

18. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 596 (Boston, Little, Brown & Co. 1868).

19. *People v. Ruggles*, 8 Johns 290 (N.Y. 1811).

der” upon which all republican governments depended.<sup>20</sup> This, Judge Kent explained, was why American law took cognizance, not only of offenses against religion, but also of threats to prevailing sexual mores—from the publication of obscene literature to marital infidelity.<sup>21</sup> In case empirical proof of the connection between irreligion and disorder were needed, Judge Kent reminded his readers that only once in modern history had a republic “hazarded” the “bold experiment” of dispensing with crimes against religion and morality.<sup>22</sup> And the results of this experiment, reflected in the Reign of Terror, suggested that Americans would be wise to avoid the path of the French.<sup>23</sup>

The crime of blasphemy was one piece of a larger complex of common law and statutory regulations that attacked moral deviance in the name of preserving republican liberty. At the heart of this traditional moral order stood the legally enforced hierarchies that ordered the home, the workplace, and many other ostensibly private spheres. In the eyes of the law, American society was composed not of coequal rights-bearing citizens, but of a dense network of relationships featuring dominant and subordinate partners—husbands and wives, masters and servants, guardians and wards. Modern notions of personhood or moral autonomy were virtually unimaginable in such a system, since the “liberty” of the dominant partner in a given hierarchy necessarily included the right to discipline the subordinate partner. In addition, American criminal law recognized (and early commentators enthusiastically endorsed) a range of status-based crimes, mostly inherited from English law, that applied to loosely defined classes of moral deviants. In most states, individuals known by reputation to be vagrants or common prostitutes were subject to summary confinement, regardless of whether the commission of any particular act could be proven in court. Further, where specific deviant acts were not covered by existing statutes or precedents, local officials could usually reach the offender through flexible legal instruments, such as the common law misdemeanor and the power to abate public nuisances.<sup>24</sup>

The most important point to note about the traditional moral order, however, is not that its understanding of privacy looks cramped by modern standards, but rather that it left little room for individual agency *even in cases where citizens were acting in accordance with conventional moral precepts*. Stated differently, the traditional moral order—with its common law hierarchies, status-based crimes, and virtually unchecked local discre-

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20. *Id.* at 294.

21. *Id.*

22. *Id.* at 295.

23. *Id.*

24. See MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 93–104 (2005) (documenting the highly discretionary character of morals enforcement in early American law); NOVAK, *supra* note 2, at 163–71.

tion—was ultimately less interested in eradicating sin than in maintaining order. Individual agency in matters of morality, even when directed at curbing acknowledged evils, was a thing to be feared, since, by definition, it tended to erode the settled patterns of authority upon which the republican edifice was believed to rest.

Consider the saga of John R. McDowall, the young Presbyterian minister who in the early 1830s launched an ill-fated crusade to curb prostitution in New York City. Working closely with the women of New York's Third Presbyterian Church, McDowall made it his mission to "rescue" the prostitutes of the notorious Five Points neighborhood. When relatively few women responded to his calls to repent and reform, McDowall decided to found a publication, *McDowall's Journal*, that would make respectable New Yorkers aware of the evil enterprise in their midst. The first issues of the *Journal*, which featured the addresses of the city's known brothels, as well as thinly veiled descriptions of the upper class gentlemen known to frequent them, did indeed cause a stir. But if the minister expected his fellow New Yorkers to reward his efforts, he had seriously misjudged public sentiment.

Indeed, McDowall managed to publish only two issues before the publication was indicted as a public nuisance. Far from applauding his attempt to curb sexual immorality, the grand jury, taking full advantage of the discretionary and local character of antebellum morals enforcement, charged the minister with using "the pretext of cautioning the young . . . against the temptations to immoral indulgence" to publish "odious and revolting" information that was "offensive to taste, injurious to morals, and degrading to the character of our city."<sup>25</sup> Nor did McDowall's troubles end with the grand jury's decision to abate his *Journal*. The thirty-five-year-old was subsequently dismissed from his ministerial position, and he died shortly thereafter, his health apparently destroyed by the ordeal.<sup>26</sup>

The deeper problem, of course, was that in attempting to stamp out acknowledged immoral behavior, McDowall and his army of female supporters were also threatening the sexual autonomy of the city's men, who were quite comfortable with vice so long as it was not practiced too openly. To the extent that McDowall's and his supporters' efforts chipped away at the unquestioned moral authority of the male head of the household, the anti-prostitution crusaders were also eroding the "good order" upon which political society depended.<sup>27</sup>

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25. John W. Kuykendall, *Martyr to the Seventh Commandment: John R. McDowall*, 50 J. PRESBYTERIAN HIST. 288, 300 (1972).

26. *Id.* at 304–05

27. See Carroll Smith Rosenberg, *Beauty, the Beast, and the Militant Woman: A Case Study in Sex Roles and Social Stress in Jacksonian America*, 23 AM. Q. 562 (1971) (examining the societal repercussions of McDowall's anti-prostitution crusade).

Something similar can of course be said of the countless female-led reform efforts that sprang up in the middle decades of the nineteenth century—from the Female Moral Reform Society, which carried on McDowall's anti-prostitution campaign following his death, to the "Women's Crusade" of the mid-1870s, in which tens of thousands of women took to the streets in an effort to rid the land of Demon Rum. Although these groups were acting in the name of religious and moral principles that were widely shared—at least among white, middle-class, native-born Protestants—their efforts were consistently hindered by the complex of laws and norms that defined the public sphere as an exclusively male domain. Female reformers could pray to their hearts' content, but attempts to chair public meetings—let alone exercise suffrage—initially met with stiff opposition, even from the men (and many women) who endorsed the reformers' policy goals. In the case of the Women's Crusade, women forced their way into the all-male domain of the saloon, where they sang hymns and prayed for the souls of proprietors and patrons. In some cities, the women had the implicit support of the authorities, but in others, pro-liquor officials took full advantage of the highly localized character of traditional morals enforcement, using their discretionary powers to arrest and try the protestors on vague charges ranging from trespassing to disturbing the peace.<sup>28</sup>

Clearly, traditional morals laws were at best an imperfect proxy for "true" morality. But under the prevailing understanding of republican government, an imperfect proxy was preferable to the alternative of unfettered moral agency. In order to explain the emergence of the modern right to privacy, we must first understand how this moral calculus came to be reversed. When and why did Americans begin to suspect that the social costs of suppressing moral agency outweighed the benefits?

## II. THE EVANGELICAL ORDER: AGENCY IN THE SERVICE OF MORALITY

The origins of a shift in the prevailing conception of the law-morality relationship can be traced to the rise, in the early decades of the nineteenth century, of a new popular theology. During the wave of revivals known as the Second Great Awakening, Americans began to abandon the relatively orthodox Calvinism of the founding generation in favor of a militantly evangelical Protestantism that broke with the traditional theory of republican government at three significant points.

First, the new generation of evangelicals looked to the "enlightened public opinion" of the present, rather than the codified wisdom of the past,

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28. See JACK S. BLOCKER, JR., "GIVE TO THE WINDS THY FEARS": THE WOMEN'S TEMPERANCE CRUSADE (1985) (providing a general overview of the Woman's Crusade); ANNIE WITTENMYER, HISTORY OF THE WOMAN'S TEMPERANCE CRUSADE 199–201, 238–43, 327–29, 397–405, 468–70, 685–86, 702 (Boston, James H. Earle 1878).



to discern the substantive content of public morality.<sup>29</sup> Recall that, for Judge James Kent and other early legal commentators, common law rules and customary practices were valuable because they reflected the accumulated knowledge of past generations with respect to the prerequisites of republican liberty. By contrast, the influential minister Lyman Beecher and other leading evangelicals cited the example of slavery to make the point that that “intrenched” institutions were as likely to shelter evil as to discourage it.<sup>30</sup> Indeed, Beecher and like-minded evangelicals came to believe that previous generations had tolerated, and in some cases endorsed, a range of activities and forms of property—liquor, lotteries, and slavery being the most prominent examples—that were properly condemned as “national sins.”<sup>31</sup> Thus, while evangelicals enthusiastically supported efforts to police public morality, their conception of public morality was dynamic in nature and reflected the evolving views of “enlightened” (read: white, native-born, Protestant) society.<sup>32</sup>

Second, many nineteenth-century evangelicals refused to accept that the primary *end* of morals enforcement should be the preservation of order, as opposed to the eradication of vice. Breaking with orthodox Calvinism’s emphasis on human depravity, they stressed the possibility of moral perfection at both the individual and societal levels. Moreover, they tended to adopt a post-millennial vision of the end times, according to which human effort would play a critical role in ushering in the Kingdom of Heaven; by spreading the Gospel and stamping out sin, both at home and abroad, Americans could hasten the Second Coming.<sup>33</sup> Taken together, these convictions suggested that there was little point in worrying, as Judge James Kent and other early commentators had, that “radical experiments” in the realm of morals regulation would jeopardize the good order on which society depended.<sup>34</sup> Indeed, traditional morals laws, to the extent that the laws toler-

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29. LYMAN BEECHER, *SIX SERMONS ON THE NATURE, OCCASIONS, SIGNS, EVILS AND REMEDY OF INTEMPERANCE* 86 (New York, American Tract Society 10th ed. 1883).

30. *Id.* at 61.

31. *Id.* at 60.

32. JOHN W. COMPTON, *THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION* (2014) (documenting nineteenth-century evangelicals’ dynamic, forward-looking conception of public morality).

33. For summaries of the key theological shifts associated with the Second Great Awakening, see NATHAN O. HATCH, *THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY* 17–46 (1989); E. BROOKS HOLIFIELD, *THEOLOGY IN AMERICA: CHRISTIAN THOUGHT FROM THE AGE OF THE PURITANS TO THE CIVIL WAR* 341–69 (2003); DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 285–327 (2009); PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 27–35 (1965).

34. It is instructive to note that, in Beecher’s influential sermons on the personal and societal costs of alcohol abuse, the word “order” does not make a single appearance. The words “reform” and “reformation,” in contrast, appear twenty-six times (“disorder” is used once, but the reference is to the soul rather than to the state). BEECHER, *supra* note 29.

ated a modicum of vice in the name of preserving order, could only be viewed as affronts to the Almighty.<sup>35</sup>

Finally, as suggested by the travails of John McDowall and the Women's Crusaders, evangelical reformers tended to view individual agency, not as a dire threat to public order, but as the key to effective morals police. Indeed, many evangelicals began to suspect that the pillars of the traditional moral order—relational rights, status crimes, and local discretion—hindered the cause of moral improvement as often as they aided it. Was it not the case, they asked, that women were frequently better exemplars of Christian morality than men? And were not local officials, particularly in the nation's increasingly machine-dominated cities, as likely to use their prerogatives to protect vice as to attack it?<sup>36</sup>

But if the old methods of policing morality no longer sufficed, what was the alternative? In his influential *Six Sermons on Intemperance*,<sup>37</sup> Beecher sketched a two-pronged reform strategy that would be followed, almost to the letter, by subsequent generations of evangelical reformers. The first prong, not surprisingly, called for greater private agency in the policing of morality. Primary responsibility for morals enforcement would shift from often corrupt and apathetic local officials to "voluntary associations" of committed Christians. These bands of enlightened citizens would educate the public about the social costs of vice, organize boycotts of immoral businesses, root out lawbreakers within their communities, and expose magistrates who refused to enforce the law.<sup>38</sup>

The ecumenical American Temperance Society ("ATS"), which Beecher cofounded in the late 1820s—and which quickly grew to a (reported) 1.5 million members—provides an early example of the power of the voluntary association.<sup>39</sup> An even more powerful example is the Women's Christian Temperance Union ("WCTU"). An organizational outgrowth of the Women's Crusade, the WCTU grew to become arguably the most influential grassroots membership organization of the late nineteenth century.<sup>40</sup> In keeping with the evangelical faith in citizen activism, groups like the WCTU pushed for reforms that empowered average citizens, including women, to play a more central role in policing morality. One popular re-

35. *Id.* at 60 (noting that God had not commanded America's Christians merely to "hem in the army of the destroyer," but rather "to turn [Satan] back and redeem the land").

36. *Id.* at 58. As early as the mid-1820s, Beecher complained that, as a result of official indifference and corruption, the "whole power of law through the nation" was "sleep[ing] in the statute-book."

37. *Id.* at 89–107.

38. *Id.* at 89–98.

39. MICHAEL P. YOUNG, BEARING WITNESS AGAINST SIN: THE EVANGELICAL BIRTH OF THE AMERICAN SOCIAL MOVEMENT 4 (2006).

40. See THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 326–27 (1992) (providing a general overview of the WCTU's political activities).

form, adopted in a handful of states, authorized women to sue the saloons into which their husbands' paychecks disappeared.<sup>41</sup> In other states, reformers rewrote the liquor laws to stipulate that no licenses would be granted unless a majority of *women* in a given county voted to approve them.<sup>42</sup>

The second prong of the evangelical reform effort aimed to strip local officials of their broad discretionary powers via laws that imposed a uniform moral code on all Americans—or, failing this, all of the residents of a given state, county, or city. The push for universal prohibitory laws was motivated by both theological and practical concerns. From a theological point of view, such laws reflected the divine command to purify the land in preparation for Christ's return. But evangelicals were also keenly aware that technological change was rendering traditional morals laws increasingly obsolete. The advent of national transportation networks and improved methods of transportation, for example, meant that even well-meaning state and local officials were increasingly incapable of stemming the flow of "immoral" goods into their respective jurisdictions. For this reason, Beecher declared in 1827, citizen morality would henceforth have to be secured through methods that were "universal, operating permanently at all times and in all places."<sup>43</sup>

Writing in the mid-1820s, Beecher hoped that the nation's Christians, once sufficiently educated about the evils of the liquor traffic, would use "the suffrage" to eradicate "ardent spirits" from the "list of lawful articles of commerce."<sup>44</sup> And indeed, evangelical reformers succeeded in enacting dozens of statewide prohibition laws during two waves of activity, the first coming in the 1850s, and the second around the turn of the twentieth century. An even more striking example of the push for "universal" remedies can be seen in Anthony Comstock's successful crusade to modernize the vague and sporadically enforced common law rules concerning obscenity, contraception, and abortion. During a flurry of lobbying activity that began in the late 1860s and lasted a little more than a decade, Comstock and his financial backers in the Young Men's Christian Association ("YMCA") convinced Congress and most of the states to adopt strict anti-obscenity

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41. See LISA M.F. ANDERSEN, *THE POLITICS OF PROHIBITION: AMERICAN GOVERNANCE AND THE PROHIBITION PARTY, 1869–1933*, at 71 n.32 (2013) (summarizing civil damage laws in several states).

42. ERNEST H. CHERRINGTON, *THE EVOLUTION OF PROHIBITION IN THE UNITED STATES OF AMERICA* 198 (1920).

43. BEECHER, *supra* note 29, at 63. The problem was particularly evident in the case of liquor. In an age when grain producers on the frontier were inundating the nation's cities with cheap liquor, the "reformation of a town, or even of a state," was akin to "emptying of its waters the bed of a river, to be instantly replaced by the waters from above; or like the creation of a vacuum in the atmosphere, which is instantly filled by the pressure of the circumjacent air." *Id.*

44. *Id.*

measures that came to be known as “Comstock Laws.”<sup>45</sup> Although the precise content of the laws varied from state to state, the aim was to eradicate a thriving traffic in “obscene” material—an expansive category that Comstock interpreted to include not only pornography, but also contraceptive devices, sex education tracts, and the advertisements of abortion providers.<sup>46</sup>

At first glance, the two prongs of evangelical reform—universal prohibitory laws and enhanced individual agency—may appear to be in tension. Most evangelicals, however, viewed them as complementary. That is to say, the reformers were not so naïve as to believe that national or statewide prohibitory laws would successfully eradicate vice absent the ongoing enforcement efforts of vigilant private citizens, acting in a semi-official capacity. Thus Comstock’s anti-obscenity campaign, conducted under the auspices of the U.S. Postal Service, relied heavily on the volunteers and paid agents of the New York Society for the Suppression of Vice (“NYSSV”).<sup>47</sup> Because machine politicians were as likely to shelter vice as attack it, Comstock insisted that the enactment of strict “modern” morals laws made the private enforcement efforts of groups like the NYSSV and YMCA all the more essential.<sup>48</sup>

A serious problem with conventional accounts of the origins of modern privacy is that they wrongly posit an all-or-nothing struggle between proponents of public morals regulation, on the one hand, and advocates of the Millen ideal of individual autonomy, on the other. In reality, relatively few nineteenth or early twentieth century Americans questioned the need for vigorous regulation of public morality. Notwithstanding the efforts of a handful of vocal atheists and free love advocates, a strong case can be made that the more developmentally significant conflict in this period pitted the traditional theory of republican government, reflected in Judge Kent’s *Rugles* opinion, against the emerging evangelical public theology, with its em-

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45. See NICOLA BEISEL, *IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA* 38 (1997) (examining Comstock’s relationship with the YMCA).

46. See WHITNEY STRUB, *OBSCENITY RULES: ROTH V. UNITED STATES AND THE LONG STRUGGLE OVER SEXUAL EXPRESSION* 14–16 (2013) (providing a concise history of Comstock’s lobbying efforts and legislative achievements).

47. See BEISEL, *supra* note 45; DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928*, at 84–112 (2001); JAMES A. MARONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* 229–34 (2004).

48. See ANTHONY COMSTOCK, *TRAPS FOR THE YOUNG* 142 (New York, Funk & Wagnalls 1883) (“Eternal vigilance is the price of moral purity. Let the efforts of this society be relaxed, or allow it to be known that its efforts will cease, and there are hundreds of villains ready to embark on this soul-destroying business.”); see also BEISEL, *supra* note 45, at 107–17 (documenting Comstock’s hatred of machine politics).

phasis on moral perfection, universal prohibition, and enhanced individual agency.

### III. MORAL AGENCY IN CONSTITUTIONAL THOUGHT

To be sure, one can find influential statements of the autonomy ideal in late nineteenth- and early twentieth-century legal opinions and treatises. The Kentucky Supreme Court's opinion in *Commonwealth v. Campbell*,<sup>49</sup> which invalidated an ordinance that prohibited the private possession and use of liquor, represents one well-known example. The Kentucky Court, in fact, went so far as to cite Mill's harm principle as an authoritative statement of the scope of individual liberty under that state's constitution.<sup>50</sup> And among legal commentators, Christopher Tiedeman argued as early as 1886 that mere "vices"—immoral acts which did "damage [only] to one's self," or whose effects on society were remote and uncertain—were beyond the constitutional limits of state power.<sup>51</sup>

Still, there is reason to believe that a single-minded focus on these early intimations of the modern autonomy ideal has blinded scholars to the arguably more profound developmental impact of the evangelical conception of moral agency. In particular, it is worth noting that many post-Civil War legal commentators were both highly critical of existing morals laws and rudely dismissive of the Millian conception of autonomy (with which they were quite familiar). Consider Theodore D. Woolsey, the longtime president of Yale—and nephew of Timothy Dwight—who in 1877 published a lengthy treatise on the practical and philosophical limits of state power. Going where few prior commentators had dared to venture, Woolsey's *Political Science* frankly posed the question: "If you make the state a legislator on moral subjects, where can you stop?"<sup>52</sup> But while Woolsey was highly critical of existing morals laws, he refused to endorse Mill's revolutionary suggestion that all consensual and self-regarding acts were beyond the legitimate reach of social coercion. The state, he insisted, "was a body built on morality," and laws against polygamy and other gross affronts to public morality could be justified in the name of social cohesion.<sup>53</sup>

Even more revealing, however, is that Woolsey disagreed with Mill on the question of precisely where the traditional morals regime went wrong.

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49. 117 S.W. 383 (Ky. 1909).

50. See *id.* at 386 ("That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." (quoting MILL, *supra* note 3, at 28)).

51. TIEDEMAN, *supra* note 6, at 116–22, 149 (providing examples of vices that were wrongly punished as crimes, including vagrancy and cross-dressing).

52. 1 THEODORE DWIGHT WOOLSEY, *POLITICAL SCIENCE OR THE STATE: THEORETICALLY AND PRACTICALLY CONSIDERED* 231 (New York, Scribner, Armstrong, & Co. 1877).

53. *Id.* at 230.

Where Mill favored greater moral autonomy on the grounds that it would foster “individuality” and “experiments in living,” Woolsey advocated legal reform for the very different reason that he hoped to cultivate a deeper, more genuine adherence to conventional religious and moral precepts.<sup>54</sup> On this basis, he argued for reforms, such as allowing women to take legal action against the saloons that served their alcoholic husbands, that would shift some degree of moral agency from the heads of households to wives and dependents.<sup>55</sup> He also attacked the double standard in prostitution enforcement on the grounds that it was both unfair to female prostitutes and obviously ineffective in curbing male demand.<sup>56</sup> One might say, then, that Woolsey accepted one of Mill’s central complaints with respect to the traditional morals regime—that it was a net negative in terms of social utility—but drew from this the polar opposite policy conclusion: not that society should abandon the attempt to police “private” vice, but that it should adopt reforms that would bring about an even closer correspondence of law and morality.

Even Tiedeman, whose distinction between crime and vice appears to have been modeled on Mill’s harm principle, included in his list of “crimes” a number of acts, such as blasphemy and polygamy, that did not violate the rights of any particular individual, but rather offended “the sensibility of the public” or were “destructive of public morals.”<sup>57</sup> In fact, it is at least arguable that Tiedeman’s main complaint about the traditional moral order was not that it aimed to impose a uniform moral code on American society, but rather, that its *methods* were crude and inefficient. They subjected individuals to arbitrary authority, and for reasons that contributed little to the ultimate end of cultivating a moral citizenry. For example, the enormous discretion that vaguely drafted vagrancy laws conferred upon local officials meant that almost anyone could, in theory, be charged with a morals offense. What was worse, status-based crimes foreclosed the possibility of reform. Such laws reversed the presumption of innocence, requiring those charged to prove that they were *not* prostitutes or idlers, with evidence of past misconduct essentially dispositive.<sup>58</sup>

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54. *Id.* at 10–11 (noting that without a considerable degree of “free action” citizens “could not attain to any high moral elevation”).

55. 2 THEODORE DWIGHT WOOLSEY, *POLITICAL SCIENCE OR THE STATE: THEORETICALLY AND PRACTICALLY CONSIDERED* 430 (New York, Scribner, Armstrong & Co. 1878) [hereinafter 2 WOOLSEY, *POLITICAL SCIENCE OR THE STATE*]. Although he stopped far short of advocating full gender equality within the home, Woolsey attacked the conventional definitions of adultery and fornication, which defined these crimes in terms of the marital status of the woman; both partners, he insisted, should be held equally accountable for breaches of the marriage covenant. WOOLSEY, *supra* note 52, at 100.

56. 2 WOOLSEY, *POLITICAL SCIENCE OR THE STATE*, *supra* note 55, at 426.

57. TIEDEMAN, *supra* note 6, at 151, 169, 172, 302.

58. *Id.* at 120–21.

Turning to the case law, one can see the impact of the moral agency idea in two lines of state appellate decisions in which judges set aside traditional morals laws, not because they impinged upon an inviolable sphere of private liberty, but rather because they interfered with efforts to cultivate a deeper adherence to evangelical moral precepts. The first line of decisions involves state laws and ordinances banning women from saloons and other drinking establishments. Such ordinances were common in the nineteenth century and reflected the law's generally paternalistic attitude towards women.<sup>59</sup> Still, from the late 1860s to the early 1900s, state appellate courts heard a number of constitutional challenges, some framed in the language of due process, others in the language of personal liberty, and still others in the language of equal protection. And although most of these challenges failed, some succeeded—and for reasons that are directly pertinent to the present analysis.

Consider *State v. Nelson*,<sup>60</sup> an Idaho case involving a saloon owner who was convicted of violating a Boise ordinance that made it a crime to “permit females to enter” or “remain in” a drinking establishment. On appeal, defendant's counsel pressed all three lines of argument described above. But the Idaho Supreme Court, while agreeing that the ordinance was unconstitutional, did not fault the city for its paternalistic attitude towards women, nor for the facially discriminatory nature of the ordinance; in fact, it declared it the “duty” of city officials to prohibit “immoral women from frequenting [drinking] places.”<sup>61</sup> The chief problem with the ordinance was, rather, that its broad language made no reference to the *purpose* of a woman's visit. Under the ordinance, any woman who set foot in a drinking establishment, regardless of her reasons for doing so, was liable to arrest. This meant that an “orderly, well-behaved woman” who ventured into a saloon “in search of a recreant husband or a wayward son” was as liable to punishment as the “immoral woman” who went there “for the purpose of drinking, engaging in games, [or] soliciting trade.”<sup>62</sup> That the ordinance was unreasonable, then, followed from the fact that in at least some cases it would work against its stated purposes. The effect of barring *all* women from saloons would be to allow men to escape the influence of the very citizens—their wives and mothers—who were most directly interested in preventing breaches of morality.

*Nelson* marks an important turning point in that the court refused to accept that laws confining women to the private sphere of the home were

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59. JULIE NOVKOV, *CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS* 113–17 (2001) (discussing the gendered logic of laws that barred women from working in saloons).

60. 79 P. 79 (Idaho 1905).

61. *Id.* at 82.

62. *Id.*

necessarily related to the protection of public morality, or that the maintenance of the hierarchical family structure was always a worthy end in itself, irrespective of its immediate moral effects. It is also important to remember that the court's concerns about the moral effects of the Boise ordinance were not purely hypothetical. The decision came, as we have already seen, at the end of a forty-year period of intense activism on the part of evangelical women opposed to the liquor traffic. Many of the foot soldiers of the Women's Crusade, who had dared to invade the all-male province of the saloon, had spent time in jail as a result. And only four years before the *Nelson* decision, Carry A. Nation had rocketed to national stardom following a spectacular string of saloon-smashing episodes, for which she, too, had spent considerable time in jail.<sup>63</sup>

Whether the members of the Idaho court supported these unconventional efforts to rein in vice is difficult to determine. But the notion that women were uniquely well suited to the task of civilizing male relatives and closing down saloons and other immoral haunts was, by the turn of the century, widely accepted by male Protestant elites.<sup>64</sup> In any event, a consensus soon developed in the state courts concerning laws that regulated the presence of women in drinking establishments: ordinances that were narrowly targeted at women who worked, loitered, or drank in saloons were "reasonable" regulations of public morality, but ordinances that were so loosely drawn as to restrict the liberties of morally upstanding women were "unreasonable" and therefore unconstitutional.<sup>65</sup>

The idea of moral agency also figures prominently in a related line of decisions in which laws that criminalized mere "association" with immoral persons were struck down as "unreasonable" police regulations. In *City of Watertown v. Christnacht*,<sup>66</sup> for example, the South Dakota Supreme Court invalidated an ordinance that imposed a fine and jail time upon any "male person" who was found to be "associating" with a "known or reputed" prostitute.<sup>67</sup> The court reasoned that the ordinance was in conflict with a state constitutional provision that protected citizens' "inherent rights" of "enjoying . . . life and liberty . . . and the pursuit of happiness."<sup>68</sup> But it was not the liberty of reputed prostitutes or their male customers that concerned the

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63. FRAN GRACE, *CARRY A. NATION: RETELLING THE LIFE* 2, 152–55, 192, 194, 200 (2001).

64. See REBECCA EDWARDS, *ANGELS IN THE MACHINERY: GENDER IN AMERICAN PARTY POLITICS FROM THE CIVIL WAR TO THE PROGRESSIVE ERA* (1997).

65. For a second opinion striking down an ordinance as an affront to the rights of morally upstanding women, see *Gasteneau v. Commonwealth*, 56 S.W. 705 (Ky. 1900). Decisions that upheld similar ordinances, while distinguishing them from the ones invalidated in *Nelson* and *Gasteneau*, include *Adams v. Cronin*, 69 P. 590, 594 (Colo. 1902) and *State v. Baker*, 92 P. 1076, 1078 (Or. 1907).

66. 164 N.W. 62 (S.D. 1917).

67. *Id.* at 62.

68. S.D. CONST. art. VI, § 1 (1917).



court. Rather, it was the liberty of ministers and other morally upstanding citizens who might undertake to rescue and reform the town's prostitutes. "To sustain the validity of the . . . ordinance," the court warned, would be to "prevent personal effort on the part of male citizens to uplift and ameliorate the condition of fallen women. Ministers of the gospel, physicians, nurses, welfare workers—all would be subject to . . . the pains and penalties of the ordinance."<sup>69</sup>

A law that barred *all* men from associating with known prostitutes was unreasonable, then, in the sense that it worked *against* the state's purported goal of cultivating a moral citizenry. To be sure, the court acknowledged that the discretionary authority of police officers and prosecutors would, in most cases, leave ministers and welfare workers free to do their work. But this was irrelevant to the constitutional inquiry, since "the constitutionality of a law" was "determined, not alone by what has been done, but by what may be done, under its provisions."<sup>70</sup>

As these decisions make clear, the notion of "reasonableness" often functioned as a proxy for moral agency. In many late nineteenth- and early twentieth-century cases, police regulations were deemed unreasonable, not because they were overly restrictive of personal liberty in the abstract, but because they were overly restrictive of the personal liberty of *morally upstanding citizens*—that is, citizens who were acting in accordance with the norms of white, middle-class, Protestant society. In these decisions we see clearly the impact of a neglected third strand of American legal/constitutional thought—a strand that rejects both the logic of the well-ordered society, with its emphasis on local discretion and hierarchy, *and* the logic of Millian autonomy.

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69. *Christnacht*, 164 N.W. at 62.

70. *Id.* For similar decisions striking down "unreasonable" morals laws, see *In Re Ah Jow*, 29 F. 181, 182 (C.C.D. Cal. 1886) (noting that an ordinance criminalizing an individual's mere presence in an opium den would prevent upstanding citizens from "transact[ing] . . . legitimate business" and carrying out "the ordinary and proper purposes of life"); *Hechinger v. City of Maysville*, 57 S.W. 619 (Ky. 1900) (invalidating an ordinance that barred women from associating with known prostitutes, while permitting male relatives to do so); *City of Grand Rapids v. Newton*, 69 N.W. 84, 85 (Mich. 1896) (noting that an ordinance punishing business owners who permitted "disorderly" persons to congregate in their establishments would "render subject to its provisions those maintaining a reformatory home for inebriates or prostitutes"); *Pinkerton v. Verberg*, 44 N.W. 579, 583 (Mich. 1889) (striking down a vaguely worded vagrancy ordinance that threatened to place "even the most respectable lady in the land under the surveillance of policemen" and to impugn "the character and reputation of the most virtuous woman"); *City of San Antonio v. Salvation Army*, 127 S.W. 860, 863 (Tex. Civ. App. 1910), *writ refused* (overturning an ordinance blocking the construction of a home for reformed prostitutes in part on the grounds that it was "not the policy of the law to throw obstacles in the path of reformation").

## IV. BEYOND COMSTOCKERY: “THAT TRADITION IS A LIVING THING”

The assault on the so-called Comstock Laws began in the early decades of the twentieth century, when birth control advocates, civil libertarians, and some medical professionals began to question the wisdom (and constitutionality) of making criminals out of those who sought to disseminate contraceptives and sexually themed literature.<sup>71</sup> As is usually the case in reform movements, the enemies of “Comstockery” attacked the existing order from a variety of angles, and, indeed, the ideal of sexual autonomy played a key role in their efforts.<sup>72</sup> Still, it seems clear that the logic of moral agency was, more often than not, at the heart of the landmark judicial rulings that ultimately dismantled the post-Civil War morals regime. In a great many cases, the censors were enjoined, not because they were preventing Americans from living out their own unique beliefs concerning contraception and sex, but because they were interfering with what judges considered to be well-intentioned, if unconventional, efforts to promote public morality.

The Second Circuit’s landmark obscenity ruling in *United States v. Dennett*<sup>73</sup> offers a striking example of how the logic of moral agency could be turned against the very laws it had once helped to justify. The case began when the sex educator and birth control advocate Mary Ware Dennett was convicted under the federal Comstock Law of sending an obscene publication—an educational pamphlet entitled “The Sex Side of Life”—through the U.S. mail. Dennett’s conviction generated an enormous amount of media attention—almost all of it critical of the jury’s finding that Dennett’s pamphlet fit the statutory definition of “obscenity.”<sup>74</sup> Most of the criticism focused on two specific aspects of the case. First, commentators noted that “The Sex Side of Life” had received endorsements from a range of state and local public health agencies, as well as from private religious organizations. Even the YMCA, the group that had led the charge for anti-obscenity laws in the 1870s, sold Ware’s pamphlet through its bookstores. To label as “obscene” a tract that was in widespread use among respectable society seemed, to many commentators, patently absurd.<sup>75</sup> Second, commentators

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71. See generally, GARROW, *supra* note 4 (providing an overview of early legal challenges to state contraception and abortion regulations).

72. See Laura Weinrib, *The Sex Side of Civil Liberties: United States v. Dennett and the Changing Face of Free Speech* (Univ. of Chicago Pub. Law & Legal Theory Working Paper No. 385, 2012).

73. 39 F.2d 564 (2d Cir. 1930).

74. John M. Craig, “The Sex Side of Life”: The Obscenity Case of Mary Ware Dennett, in 15 FRONTIERS: A JOURNAL OF WOMEN STUDIES 145, 151–52 (1995).

75. In addition to the YMCA and the YWCA, the nation’s largest Protestant ecumenical organization, the Federal Council of Churches, publicly condemned Dennett’s conviction. CONSTANCE M. CHEN, “THE SEX SIDE OF LIFE”: MARY WARE DENNETT’S PIONEERING BATTLE FOR BIRTH CONTROL AND SEX EDUCATION 299 (1996).

viewed Dennett's conviction as evidence that enforcement of the federal obscenity law was an arbitrary and even vindictive business. To many, it seemed likely that federal officials had taken advantage of the law's vague wording to punish Dennett for her public attacks on the Postal Service's policies with respect to contraception and sexually themed material.<sup>76</sup>

On appeal, Judge Augustus Hand ruled that "The Sex Side of Life" did not, in fact, fall within the statutory definition of obscenity.<sup>77</sup> Judge Hand's opinion, which pioneered the idea that a potentially obscene work should be evaluated in terms of its dominant theme, broke with the more restrictive "Hicklin Test," thus paving the way for a line of decisions that vastly expanded Americans' access to sexually themed art and literature.<sup>78</sup> For present purposes, however, the more salient point is that Judge Hand's opinion closely tracked the logic of evangelical moral agency. Although he did not dispute the federal government's power to criminalize the dissemination of obscene material, Judge Hand insisted on interpreting the term "obscenity" in light of contemporary public opinion. It was true that, under the "old theory" of Comstock's day, Americans had believed that education "about sex matters should be left to chance" and cloaked in "mystery and reticence."<sup>79</sup> But by 1930, most Americans no longer regarded educational tracts "fairly . . . calculated to aid parents in the instruction of their children in sex matters" as beyond the pale.<sup>80</sup> In case empirical evidence of this shift was needed, Justice Hand cited the recent publication, by the U.S. Public Health Service, of a pamphlet entitled "Sex Education"—a development that would have been unimaginable under the "old theory."<sup>81</sup>

It was also clear, at least to Judge Hand, that suppressing a soberly worded educational pamphlet was unreasonable, in the sense that it contributed nothing to the "general objects aimed at" by the statute.<sup>82</sup> Indeed, if the statute's purpose had been to curb illicit sexual desires, then the effects of suppressing "The Sex Side of Life" could only be described as perverse. In the absence of "intelligent and high-minded sources" of information, children would be left to "grope about in mystery and morbid curiosity . . . secur[ing] such information, as they may be able to obtain, from ill-informed and . . . foul-mouthed companions."<sup>83</sup> The "direct aim and net result" of Dennett's pamphlet, then, was not to "arouse sex impulses," but ra-

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76. H.L. Mencken, *The Smut-Snufflers*, in 20 THE AMERICAN MERCURY 253–54 (1930).

77. *See Dennett*, 39 F.2d at 569.

78. *Id.* at 568.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 569.

83. *Id.* at 568.

ther to promote the type of “understanding and self-control” that were essential to the cultivation of a moral citizenry.<sup>84</sup>

Given that *Dennett* and its progeny are typically classified as speech cases, one may wonder what connects them to the Supreme Court’s landmark sexual privacy rulings of the 1960s and 1970s. The answer is that *Dennett*—the case that struck the first significant blow against a federal Comstock Law—established a template that could be used to challenge the entire complex of state and federal Comstock Laws. If the content of public morality was to be derived from contemporary public opinion, and if morals laws were not to be enforced in ways that unreasonably worked against the state’s purported objective of cultivating a moral citizenry, then a law that denied married couples access to contraception was every bit as vulnerable to these objections as a law criminalizing the mailing of an educational pamphlet.

Indeed, although most of the scholarly commentary on *Poe v. Ullman*<sup>85</sup> and *Griswold v. Connecticut*<sup>86</sup> has focused on the Justices’ competing theories of substantive due process, it is worth noting that both Justice Harlan’s influential dissent in *Poe* and Justice Douglas’s majority opinion in *Griswold* followed the basic contours of Judge Hand’s *Dennett* opinion. In *Poe*, after explicitly affirming the state’s right to regulate at least some “consensual” sexual behavior, Justice Harlan concluded that Connecticut’s contraception ban was nonetheless unconstitutional.<sup>87</sup> The problem, as in *Dennett*, was that the state had employed an overly broad means (a complete ban on the *use* of contraception) that lacked the backing of—and, indeed, flew in the face of—a public consensus that viewed contraceptive use as positively beneficial, at least within the context of marriage. To be sure, judges were to be guided by “tradition” when considering whether particular acts were constitutionally protected under the Due Process Clause. But the tradition in question was “a living thing.”<sup>88</sup> It reflected the current “balance struck by this country” between “liberty and the demands of organized society,” “having regard to what history teaches are the traditions from which it developed *as well as the traditions from which it broke*.”<sup>89</sup> Viewed in this light, the underlying assumption of “the so-called Comstock Law”—that the use of contraceptives by married couples posed a threat to public morals—could only be regarded as a relic of a “by-gone day.”<sup>90</sup>

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84. *Id.* at 569.

85. 367 U.S. 497 (1961).

86. 381 U.S. 479 (1965).

87. 367 U.S. at 546–67 (Harlan, J., dissenting).

88. *Id.* at 542.

89. *Id.* (emphasis added).

90. *Id.* at 546 n.12.

But Justice Harlan, following Judge Hand, also identified a second flaw in the Connecticut statute: its real-world effects were in conflict with the state's purported aim of curbing extramarital sexual conduct and its associated social harms. To be sure, Justice Harlan agreed that the states should make every effort to "foster[] and protect[]" the institution of marriage.<sup>91</sup> But the institution of marriage presupposed a considerable degree of autonomy on the part of those who embraced it, and it was unlikely to flourish where "the whole machinery of the criminal law" was inserted "into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy."<sup>92</sup> Simply put, a law that would have the practical effect of eviscerating an institution could not reasonably be described as protecting or fostering that same institution.

It is worth noting that Justice Douglas, in a separate *Poe* dissent, did attack the Connecticut law on explicitly Millean grounds, citing *On Liberty* on the dangers of permitting "intolerant groups" to stifle "experimentation" in the realms of sex and contraception.<sup>93</sup> And yet, four years later, when he found himself in the position of authoring an opinion striking down Connecticut's contraception ban, Justice Douglas conspicuously eschewed the Millean justification on which he had so recently relied. Instead of faulting Connecticut for imposing a uniform moral code on the state's citizens, Justice Douglas's *Griswold* opinion objected only to the fact that the regulatory means employed by the state "swe[pt] unnecessarily broadly."<sup>94</sup> Echoing Justice Harlan's *Poe* dissent, he pointed out that enforcement of the contraception ban would exert "a maximum destructive impact upon" the very institution that the state was ostensibly attempting to protect.<sup>95</sup> In short, Connecticut's decision to deny married couples access to contraception, like the federal government's earlier suppression of a high-minded educational tract, was not only out of step with contemporary opinion but also impossi-

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91. *Id.* at 553.

92. *Id.*

93. *Id.* at 514, 518 (Douglas, J., dissenting). Indeed, Douglas went so far as to declare that "free society need[ed] room for vast experimentation" with respect to matters of sex and contraception. Any attempt to "stop experimentation," he warned, would prevent the development of "new insights" into the human condition and "deprive society of needed versatility." *Id.* at 518.

94. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

95. *Id.* The three concurring opinions in *Griswold* employed a similar logic. Justice Harlan referred readers to his *Poe* dissent. *Id.* at 500 (Harlan, J., concurring). Justice Goldberg, while affirming that the constitutionality of criminal laws targeting adultery and fornication was "beyond doubt," nonetheless found that the contraception ban "swe[pt] unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples." *Id.* at 498 (Goldberg, J., concurring). Finally, Justice White deemed it "purely fanciful" to believe that "the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the State's policy against such relationships." *Id.* at 506 (White, J., concurring).

ble to reconcile with the state's acknowledged interest in cultivating a moral citizenry.

It is often noted that the Court's privacy jurisprudence has in the years since *Griswold* splintered into three relatively distinct strands.<sup>96</sup> At times, the Court has defined the right to privacy as extending only to practices that are "deeply rooted in the Nation's history and tradition."<sup>97</sup> On other occasions it has grounded its rulings, at least in part, on the contemporary or "emerging" values of American society—as when Justice Kennedy invoked "the laws and traditions [of] the past half century" in the process of invalidating Texas's criminal ban on sodomy.<sup>98</sup> On still other occasions, the Court has employed the unvarnished language of Millian autonomy, endorsing the "right to define one's own concept of existence, of meaning, of the universe."<sup>99</sup>

To some observers, the shifting foundations of the Court's privacy rulings, as well as the mingling of arguably contradictory principles within single opinions, are clear signs of a judiciary determined to impose its own (elite, liberal, secular) values on American society. Thus, in his *Lawrence* dissent, Justice Scalia read Justice Kennedy's majority opinion, with its alternating references to the citizen's "autonomy of self" and the "emerging" views of society, as a policy preference in search of a principle.<sup>100</sup> The *Lawrence* majority, Scalia complained, was enmeshed in a "law-profession culture" that was bent on advancing "the so-called homosexual agenda," with or without the aid of a coherent conception of constitutional privacy.<sup>101</sup> The evidence surveyed above suggests, however, that morals laws of the sort invalidated in *Lawrence* have coexisted uneasily with competing ideals of moral agency and autonomy for more than a century. The roots of the oft-noted tensions in the Court's privacy jurisprudence thus run far deeper than Justice Scalia supposed.

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96. See, e.g., Lund & McGinnis, *supra* note 14, at 1571–75.

97. Moore v. East Cleveland, 431 U.S. 494, 503 (1977); Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

98. Lawrence v. Texas, 539 U.S. 558, 572–73 (2003).

99. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

100. Lawrence, 539 U.S. at 562, 572 (Scalia, J. dissenting).

101. *Id.* at 602.